



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 608 OF 2007**

**IN THE MATTER OF THE ESTATE OF DAUDI MAMBILI ..... DECEASED**

**AND**

**JULIUS SHISUVILI MUHINDA ..... PETITIONER**

**V E R S U S**

**SOPHIA ADOLWA ..... OBJECTOR**

**R U L I N G**

This court made a ruling on the 15.12.2011 distributing the deceased's estate and issued a certificate of confirmed grant. The applicant/objector filed his application dated 26.8.2013 seeking to set aside the confirmed grant and to be allowed to adduce oral evidence. The application is supported by his affidavit sworn on the same dated. The petitioner who was the original objector **SOPHIA ADOLWA** filed a replying affidavit sworn on the 24.10.2013. Parties agreed to rely on the pleadings for the court to make its ruling.

The applicant contends that he would like oral evidence to be taken so that issues relating to the beneficiaries and to the share of **PIUS AMAHAWA LWOYELO** of **0.08** hectares is determined. The applicant would like oral evidence to be taken so that there can be a good record for purposes of appeal. The applicant is a grandchild of the deceased. The distribution was made after parties agreed to file affidavits on distribution without calling any evidence. The applicant was given 0.22 hectares together with **DAVID LUGANU**. It appears to me that the distribution was fair to all the other beneficiaries. The applicant filed an application dated 21.12.2011 seeking leave to be allowed to file an appeal out of time. The application was granted and a notice of appeal dated 27.1.2012 was filed. The applicant contends that he would like oral evidence to be taken so that there can be a proper record for his appeal. The record shows that all parties herein were represented by advocates. The objector was the petitioner and he was represented by Mr. Nyikuli when parties appeared before Justice Lenaola on the 12.4.2011. It is clear to me that parties informed the judge to write a ruling based on the affidavits on distribution. The current application does not raise any issue other than the allegation that PIUS ought not to have been given the 0.08 hectares. In his mode of distribution the applicant had not allocated Pius any share. The judge overruled that contention as it was found that Pius had refunded a purchaser some money and was therefore entitled to that share. It is clear that the applicant would like to proceed with his appeal but would like to cross-examine witnesses on the aspect of Pius's share. I do not think that that is the way to go. The application is purely meant to facilitate the applicant's appeal. This is an abuse of the court process. The applicant should pursue his appeal based on the information on record as opposed to subjecting the court to calling for evidence which he failed to do before.

I do find that the application lacks merit and is an abuse of the court process. It is hereby dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 19<sup>th</sup> day of June 2014

**SAID J. CHITEMBWE**

**J U D G E**

